



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 27, 2007

CBCA 12, 33, 365, 366, 367

INNOVATIVE (PBX) TELEPHONE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David W. Young, Vice President of Innovative (PBX) Telephone Services, Inc., El Paso, TX, representing Appellant.

Brian Reed, Dennis Foley, and Phillipa Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **FENNESSY**, and **SHERIDAN**.

SHERIDAN, Board Judge.

These appeals arise out of disputes between the appellant, Innovative (PBX) Telephone Services, Inc. (IPS), and the respondent, Department of Veterans Affairs (VA), at the VA Health Care Center (VAHCC) in El Paso, Texas. IPS has filed an appeal on a \$6 million claim which cites a “breach of contract including tort and bad faith on the part of the Government employees at the VAHCC in El Paso, Texas, for events surrounding contract V101(93)P-1458 and the Las Cruces[, New Mexico, VA] Clinic.”

The respondent filed a motion to dismiss the appeals, arguing that the Board lacks jurisdiction to entertain the appellant’s complaint, the appellant has not stated a claim upon which relief can be granted, and the appellant has failed to prosecute its claim in accordance

with Board rules and orders. The respondent attaches to its motion several documents. The appellant opposes the respondent's motion and has submitted a motion for sanctions against the respondent. The appellant also attaches several documents to its opposition and motion. The respondent has responded to the appellant's motion, and the appellant has replied to the respondent's response. The documents that have been submitted with these motions are incomplete, but they provide a sufficient foundation upon which to base our decision. For purposes of deciding the respondent's motion, we have accepted as true all well-pled facts alleged by the appellant.

In considering the respondent's motion to dismiss for lack of jurisdiction, the burden of establishing jurisdiction is on the appellant. *Houston Ship Repair, Inc. v. Department of Transportation*, DOTCAB 4505, 06-2 BCA ¶ 33,381 (citing *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988)). In order to assist us in evaluating the merits of the respondent's motion to dismiss, we look for guidance to the standards used for the Federal Rules of Civil Procedure. Board Rule 1(c) (72 Fed. Reg. 36,794, 36,796 (July 5, 2007)). Under Federal Rule of Civil Procedure 12(b)(1), the allegations of the complaint must be construed in favor of the pleader. If, based on well-pled facts, the appellant might prevail, we must deny the motion. *Key Federal Finance v. General Services Administration*, CBCA 411, et al., 07-1 BCA ¶ 33,555 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *W. R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988); *Reynolds*, 846 F.2d at 747). If, however, the respondent challenges the truth of the jurisdictional facts alleged in the complaint, the Board may expand its consideration of evidence beyond the pleadings. *See, e.g., Detroit Housing Corp. v. United States*, 55 Fed. Cl. 410, 412 (2003). "The [tribunal] should look beyond the pleadings and decide for itself those facts, even in dispute, which are necessary for a determination of [the] jurisdictional merits." *Id.* (citing *Pride v. United States*, 40 Fed. Cl. 730, 732 (1998)); *see also Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (when jurisdiction is at issue, the tribunal is not limited to the pleadings). We have looked to the documents submitted with the motions to evaluate the jurisdictional issues presented by these appeals.

Statement of Facts

The El Paso VA Health Care System (VAHCS) currently includes the main campus VAHCC in El Paso, Texas, and an outpatient clinic in Las Cruces, New Mexico (Las Cruces VA Clinic). In 1994, the VA wanted to replace the telephone system at the El Paso VAHCC, and on November 14, 1994, the VA Acquisition Operations Service approached the Small Business Administration (SBA) to obtain a qualified 8(a) firm capable of performing the

work.¹ IPS was the subcontractor proffered by the SBA, and on March 24, 1995, the VA awarded contract V101(93)P-1458 (hereinafter referred to as the telephone system contract). Under the terms of the telephone system contract, IPS agreed to replace the old telephone system at the El Paso VAHCC with a new Mitel telephone system. The work included furnishing and installing the telephone system in accordance with the contract specifications. The contract contained various schedules, each setting forth a list of products and services that were available under the contract using contract line item numbers (CLINs). Through these schedules the VAHCC was able to purchase, by CLIN, the telephone system products and services it needed. Each CLIN had an associated price. IPS also was required to provide maintenance on the new telephone system for one base year and as many as nine additional years. The additional years of maintenance were to be provided at the option of the VA.

The telephone system contract was awarded and the installation portion of the contract administered by the VA Acquisition Operations Service in Washington, D.C. After installation of the system, the administration of the maintenance portion of the contract was delegated to the El Paso VAHCC. On September 26, 2000, Mr. Daniel Portillo, the contracting officer assigned to administer the maintenance portion of the telephone system contract, designated Mr. Jack Jordan, the chief of the Facility Support Service at the El Paso VAHCC, as the contracting officer's technical representative (COTR). In his position as chief, Mr. Jordan was involved in the planning, decisions, procurement, and administration of the many contract-related actions throughout the VAHCC, including contracts for construction, installation, repair, and maintenance of various facility systems.

While IPS was providing maintenance services on the telephone system, the VAHCC issued other contractual instruments to IPS to provide additional products and services. For example, on September 26, 2002, Mr. Portillo issued purchase order 756-C20035 for supplies and services related to a television recabling project in the main building at the El Paso VAHCC (hereinafter referred to as the television recabling purchase order). The television recabling purchase order required that IPS "adhere to standard VA specifications and the specifications listed in the construction documents already provided to the contractor." The document is not clear as to what construction documents had been supplied to IPS, but the purchase order used the CLIN items and pricing contained in the telephone system contract. Therefore, we assume the construction documents were those relating to the telephone system contract. We note that Mr. Jordan appeared on some of the documentation related to this project as the "approving official."

¹ IPS was designated as a subcontractor in the program authorized by section 8(a) of the Small Business Act. 15 U.S.C. § 637(a) (1994).

On May 14, 2003, an incident occurred involving Mr. David Young, IPS' vice-president, and Mr. Jordan. Mr. Jordan called IPS' corporate offices conveying a complaint that had been made about the cable televisions not working at the El Paso VAHCC. He spoke to Mr. Young. Mr. Young recounts, in a May 15, 2003, letter titled "Official Complaint," to Mr. Byron Jaqua, the director of the El Paso VAHCC:

On Wednesday, May 14, 2003 . . . Mr. Jordan called IPS' corporate office regarding the [cable televisions] within the VA[HCC]. He stated that all the [televisions] were down. To our surprise, all the sites he mentioned, 4th floor neurology, cardiology, and the 1st floor conference rooms[,] were all operating properly when IPS' technician left the VA[HCC] on Friday afternoon from adding the local channels. . . . This was explained to Mr. Jordan but it was not the answer he wanted to hear. Mr. Young told him th[at IPS] would look into it to find out why the [televisions] were not operating. It was then explained to Mr. Jordan that Mr. Young was in a meeting discussing a facsimile that was just received in [IPS'] office that morning from Mr. Daniel Portillo regarding a couple of outstanding work orders at the VA. It was also explained to Mr. Jordan that there was a due date for a response to the facsimile.

At hearing this, Mr. Jordan became irate and would not listen to reason. Mr. Young told Mr. Jordan that he needed to calm down so they could discuss the matter professionally; this only made Mr. Jordan more upset and he became belligerent. When Mr. Jordan began screaming, Mr. Young pushed the speaker button on the telephone so that all parties in the conference room could witness what was being said. It was then, Mr. Jordan, in our opinion, completely lost control of his demeanor and began screaming and swearing at the top of his voice. A banging sound was heard in the background, as if Mr. Jordan was hitting a wall or desk to punctuate his sentences. Mr. Jordan demanded that Mr. Young "get his 'black ass' over to the VA and fix the televisions or he [Mr. Jordan] was going to use all his power to make sure IPS' contract with the VA would be cancelled and he would also ensure that IPS would never receive another VA contract in this country again."

For purposes of deciding this motion, we accept IPS' version of these events as true.

Mr. Jaqua responded to the complaint letter on June 16, 2003, with a letter to Mr. Young stating that he had reviewed the letter and witnesses' statements. He had met with Mr. Jordan to discuss the matter to determine what appropriate facility action needed to be taken "to make sure that our contract with your office is maintained according to contracting regulations and procedures." Mr. Jaqua wrote, "[r]acial comments or use of curse words will

not be tolerated and respect for others is expected.” While he did not indicate whether he agreed that the event complained of had occurred, he did write, “I can assure you that this incident is being resolved so that we can continue to work together under current contract requirements.” He also informed IPS that he had asked Mr. Portillo to meet with IPS to resolve issues regarding services, billings, and payments, also raised in the complaint letter.

Following the May 14, 2003, incident, the VAHCC continued to exercise the options for annual maintenance that were available under the telephone system contract. Other contractual instruments were used to procure additional supplies and services from IPS. Pricing for the additional supplies and services was based on the CLINs and the pricing contained in the telephone system contract. Mr. Louis Barba, Jr., an engineer in the VAHCC’s Facility Support Service, was designated the COTR on IPS’ contract “for the maintenance of the phone system” on December 4, 2003.

Mr. Young wrote to Mr. Jaqua again on November 20, 2003, attempting to distance IPS from Mr. Jordan, whom he alleged was still being “unprofessional toward [IPS] technicians and purposely delayed payments due our company.” Mr. Don Martin in the VAHCC’s Facility Support Service replaced Mr. Barba as COTR on January 28, 2004. The final option year of maintenance on the telephone system contract was set to expire on March 23, 2005; however, the VAHCC extended the contract to run through September 30, 2005. According to the VA, this six-month period was the maximum amount of time that it was allowed to extend the telephone system contract pursuant to Federal Acquisition Regulation (FAR) 52-217-9, Option to Extend Services.

On September 6, 2005, Mr. Young wrote Mr. Michael Bell, who was appointed the acting director at the VAHCC after Mr. Jaqua left. Mr. Young complained that “IPS firmly believes that Mr. Jordan still has ultimate authority over the telecommunications decision making process at the El Paso VA[HCC],” and that his involvement is hindering IPS from “fulfilling our contract to the best of our ability.” IPS provided no specificity as to how it was being hindered by Mr. Jordan. Mr. Bell wrote back to IPS on September 16, 2005:

Effective the week of September 19, 2005, the responsibility for [COTR] and operational management will be the El Paso [VAHCC’s] Information [Resource] Management Service (IRM). I anticipate that Mr. Juan Garcia will be appointed COTR.

I have asked my Executive Assistant . . . to coordinate this transfer of responsibility and to facilitate closing out all open issues from the current COTR to include matters of payments due.

As the FAR allowed no further extensions of the telephone system contract, supervisory contract specialist and contracting officer Ms. Catalina (Cathy) Fernandez issued purchase orders to IPS. Through various contract instruments the VA had IPS obligated to provide telephone system maintenance services at the VAHCC through September 30, 2006.

The documents in the Board's possession show that Mr. Jordan initiated, authorized, approved, and/or was otherwise involved in several job requests, work orders, and payments through September 2005. These activities all referenced CLINs and pricing in IPS' telephone system contract. On March 1, 2006, Mr. Juan Garcia, the chief of the VAHCC's IRM service, was designated the primary COTR "on the contract with IPS for the maintenance of the telephone system at the VAHCS."

In anticipation of the expiration of IPS' contractual coverage for maintenance of the telephone system, the El Paso VAHCS began considering what it should do to meet its future telephone system needs. Ultimately, it decided to keep the Mitel telephone system installed by IPS. It approached the SBA to obtain a contractor to perform the future telephone system maintenance work. On July 21, 2006, the SBA offered H Squared Industries, Inc., an 8(a), service-disabled, woman-owned business, to meet the VAHCC's telephone system maintenance needs. The VA informed IPS that its services to maintain the VAHCC's telephone system were no longer needed as of July 18, 2006.

In the meantime, on May 2, 2006, IPS had submitted a certified claim, citing a "breach of contract including tort and bad faith on the part of the Government employees at the VAHCC in El Paso, Texas for events surrounding contract no. V101(93)P-1458 [the telephone system contract] and the Las Cruces [VA] Clinic." The claim also included allegations of racial discrimination by VAHCC employees. IPS sought \$6 million in "expectancy damages which are equated with lost profits and other elements which will make IPS whole."²

² IPS also maintains in its brief that it submitted another claim on contract V101(93)P-1458 and subsequent purchase orders. The VA denies receipt of this claim. The appellant has been unable to produce an executed copy, and it does not appear that the claim was resubmitted to the contracting officer. As IPS has not elected to appeal the contracting officer's failure to issue a final decision, the allegations contained in the letter are not properly before us for use in issuing this decision. *Willie Clarence Logan v. Department of State*, GSBICA 15691-ST, 02-2 BCA ¶ 31,915.

Ms. Fernandez responded to IPS' claim on May 12, 2006, stating:

[T]here is no basis for recovery of a tort under the Contract Disputes Act. The allegations of racial slurs are related to the [television cabling] installation project which was issued under a separate purchase order and are not related to the above-referenced contract.

The contract awarded to your company for the installation of the Mitel telephone system and the follow-up maintenance period expired in March of 2005. However, the facility has continued to issue purchase orders to your company for the telephone maintenance ever since the expiration of the above-referenced contract.

. . . .

Your company has not been damaged in any way as your company has continued to receive purchase orders for the telephone maintenance for the [El Paso VAHCC] and the Las Cruces [VA Clinic]. The claims in your letter are not adequately described and are not itemized. Your company is not entitled to any additional compensation, and therefore, I am denying all these claims.

IPS appealed the final decision to the VA Board of Contract Appeals on July 18, 2006. The VA Board docketed the appeal as VABCA 7593 (addressing claim items I and II), VABCA 7594 (addressing claim items III, IV, and V), VABCA 7595 (addressing claim item VI), VABCA 7596 (addressing claim items VII and VIII), and VABCA 7597 (addressing claim items IX, X, XI, and XII). The VA Board was, pursuant to statute, consolidated into the Civilian Board of Contract Appeals on January 6, 2007. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006). VABCA 7593 was redocketed as CBCA 12, VABCA 7594 as CBCA 33, VABCA 7595 as CBCA 365, VABCA 7596 as CBCA 366, and VABCA 7597 as CBCA 367.

We note that regarding the matters before us, the appellant mirrors the same numbering system (using roman numerals to designate counts I through XII) that it used to designate claim items. We elect to refer to this same numbering system that interchangeably refers to both complaint counts and claim items. Set forth below are the respective appeals with their corresponding claim items and complaint counts.

CBCA 12 -- Complaint, counts I and II (claim items I and II)

In counts I and II of its complaint, IPS seeks \$1.2 million in damages from the VA, alleging:

I. It is our belief that IPS has been a victim of a series of instances of bad faith, beginning with but not limited to racial prejudice on the part of Government officials at the VAHCC and the Las Cruces [VA] Clinic.

II. It is our opinion that the contracting officer's technical representative and chief of [the VAHCC's] Facility Support Service (FSS) (which during the time of most of the incident oversaw the contracting department), Mr. Jack Jordan, discriminated against IPS because of our company being owned and operated by Afro Americans.

CBCA 33 – Complaint, counts III, IV, and V (claim items III, IV, and V)

In counts III, IV, and V of its complaint, IPS seeks \$1.2 million in damages from the VA, alleging:

III. It is further our opinion that Mr. Jordan and John Doe conspired against IPS to injure IPS and to financially force IPS out of business.

IV. It is our firm resolve to provide solid evidence that Mr. Jordan and John Doe, employees of the VAHCC attempted financial sabotage of IPS.

V. It is our opinion that Mr. Jordan attempted to sabotage IPS' contract with the VAHCC and the Las Cruces [VA] Clinic.

CBCA 365 -- Complaint, count VI (claim item VI)

In count VI of its complaint, IPS seeks \$1.2 million in damages from the VA, alleging:

VI. IPS feels that Mr. Jordan violated our Civil Rights by making disparaging racial comments against one of IPS' officers. We feel that as a government official he has flagrantly abused his position, which is an act of bad faith and breach of contract. See May 15, 2003 complaint letter. When IPS contacted the Contracting and Administrative [offices at the VAHCC El Paso] regarding this urgent issue, very little to no action was taken.

CBCA 366 -- Complaint, counts VII and VIII (claim items VII and VIII)

In counts VII and VIII of its complaint, IPS seeks \$1.2 million in damages from the VA, alleging:

VII. It is further our opinion that on numerous occasions Mr. Jordan made disparaging comments regarding IPS that slowly but effectively ruined IPS' reputation with the VAHCC, harming IPS' ability to win new contracts with this VA facility, this is a prime example of tort.

VIII. IPS has been irreparably harmed by the VAHCC as described by the following instances:

A. IPS was informed by William Beaumont Army Medical Center (WBAMC) staff that the VAHCC approached WBAMC to strongly consider having WBAMC provide the telecommunication service for the VAHCC. It is IPS' understanding that this violates [VA] Central Office policy regarding VA facilities which states that each VA [facility] should have its own stand-alone telecommunications system (See R[FP] [request for proposal] 101-11-95 and other similar R[FP]s). If Mr. Jordan had not destroyed IPS' reputation at the VAHCC, this option would never have been a consideration.

B. IPS was informed through the Federal Government notification service that the VAHCC began requesting bids for the telephone maintenance service. It is IPS' opinion that this decision will be more costly for the VAHCC since they will now have to train another vendor, who unlike IPS, has not been with the VAHCC since its inception, and therefore will not perform maintenance tasks with the same level of proficiency as IPS which we naturally draw from our vast experience at this site. This decision is not in the best interest of the veterans of which we are a veteran owned company. To date, IPS feels that this situation is a direct result from bad faith on the part of Mr. Jordan.

C. Comments by Mr. Jordan such as "I'm going to get IPS off of this contract," and "I will make sure you (IPS) never get another contract" have irrevocably harmed IPS and to date IPS

is still suffering as a direct result from these disparaging comments.

CBCA 367 -- Complaint, counts IX, X, XI, and XII (claim items IX, X, XI, and XII)

In counts IX, X, XI, and XII of its complaint, IPS seeks \$1.2 million in damages from the VA, alleging:

IX. Through discovery, IPS feels that more evidence of bad faith will be uncovered against IPS and other minority owned contractors. It is our belief that race is one of the reasons the VAHCC, by means of its employees, has discriminated against our company.

X. IPS understands that the burden of proof lies on our ability to prove what has been alleged. IPS understands that in order to overcome this presumption IPS must allege and prove, by clear and strong evidence, specific acts of bad faith on the part of the government which we feel there is evidence of specific intent to injure IPS.

XI. IPS also claims and believes that the VAHCC acted arbitrarily and capriciously. As a result of the disparaging comments about IPS, IPS has suffered. It is our opinion that there is significant evidence that the VAHCC acted in bad faith.

XII. Furthermore, it is our belief that the government official Mr. Jordan and John Doe at the VAHCC, by their actions, attempted the financial destruction of IPS by avoiding payments and by derailing future contracts, which ultimately would financially ruin IPS, another act of bad faith. IPS is hereby seeking adequate adjustments for consequential damages in regard to events surrounding Contract Nos. [sic] V101(93)P-1458 and the Las Cruces Clinic.

Discussion

The respondent has moved the Board to dismiss CBCA 12, 33, 365, 366, and 367, arguing that we lack jurisdiction to consider these appeals. The scope of our jurisdiction is limited by the appellant's May 2, 2006, claim; we have the authority to resolve only the issues raised in the notice of appeal that were also presented to the contracting officer in the claim. The initial thrust of the respondent's motion seems to be that the Board lacks jurisdiction to consider each of the appellant's claims because the claims only referenced the telephone system contract (V101(93)P-1458) as opposed to the television recabling purchase

order (756-C20035). It was in regard to the television recabling purchase order work, the respondent avers, that an alleged bad faith racial comment was made. The respondent asserts that because the television recabling work was not related to the telephone system contract in any way, the Board lacks jurisdiction to entertain the appellant's claim referencing the telephone system contract. The appellant, however, avers that the pricing for the television cabling purchase order, and all the work that IPS performed at the El Paso VAHCC, was based on the CLINs and the pricing contained in the telephone system contract. IPS posits: "only one contract was performed [by IPS] at the VAHCC, contract V101(93)P-1458 [the telephone system contract]."

While the contractual instruments that the VAHCC issued to IPS bore various titles - work order, job order, job request, purchase order, contract, and contract extension - IPS contends, and it appears from the documents, that the CLINs and pricing contained in the telephone system contract served as the basis for all the subsequent instruments the VAHCC issued to IPS for products and services. As an example, IPS explains that when the VAHCC sought to procure the television recabling work, it first modified the telephone system contract to add additional products and services necessary for television cabling. The television cabling products and services were added to the telephone system contract as CLINs, with the pricing for each new CLIN agreed upon by the parties. Thus, television cabling products and services that were not in the telephone system contract as originally awarded were, by that modification, made available for purchase under the telephone system contract. It was only after the telephone system contract had been modified that the VAHCC issued a purchase order to procure the products and services from IPS needed to perform the television recabling project.

We do not see the respondent's argument as compelling the dismissal of these appeals. A more fundamental flaw exists with the appellant's appeals which we will discuss *infra*. While the appellant's position that only one contract was performed by IPS at the VAHCC is both a factual and legal conclusion, it is not an argument we are willing to summarily dismiss. So too, it is not an issue we need to resolve for purposes of deciding the respondent's jurisdictional motion. Whether the appellant's claim was brought under the telephone system contract or some other contract instrument is immaterial because the appellant has wholly failed to tie any alleged bad faith action to a provision or performance of a contract it had with the VAHCC.

Allegations of bad faith on the part of government officials administering the contract are found in each count of the appellant's complaint. Arising out of the alleged bad faith actions are claims sounding in tort, contained in counts III, IV, V, VII, VIII.A, and VIII.C, where the appellant alleges it has been the victim of conspiracy, sabotage, and attempts by VAHCC employees to force it out of business. Also flowing from the bad faith acts are the

appellant's claims of racial discrimination by government officials found primarily in counts I, II, VI, VII, VIII.B, IX, X, XI, and XII of its claim and complaint. We note at the outset of this discussion that the appellant's allegations are vague, generalized, and conclusory, and can hardly be considered "well-pled," as IPS fails to provide any factual basis to support them.

The appellant seems to take the position that the May 14, 2003, incident involving Mr. Jordan is specific proof of bad faith, racially discriminatory actions on the part of Mr. Jordan and other VAHCC employees, bent on adversely impacting IPS' future contracting opportunities. During that incident, Mr. Jordan screamed a racially insensitive phrase at Mr. Young and told him fix the televisions or "he [Mr. Jordan] was going to use all his power to make sure IPS' contract with the VA would be cancelled and . . . that IPS would never receive another VA contract in this country again." In addition to the May 14, 2003, incident, the appellant alludes to "other bad faith actions taken against IPS by Mr. Jordan and other VAHCC employees," but the appellant fails to provide any specifics. The appellant complains it has been a victim of conspiracy, sabotage, and attempts to force it out of business, speculating that Mr. Jordan and "John Doe at the VAHCC" have attempted to ruin its reputation and its ability to obtain other contracts at the VAHCC. IPS acknowledges "this is a prime example of tort." IPS accuses Mr. Jordan and "John Doe" of attempting to harm it by "avoiding payments," and theorizes that "more evidence of bad faith will be uncovered against IPS and other minority owned contractors through discovery." IPS also avers that Mr. Jordan violated its civil rights by making "disparaging racial comments against one of IPS' officers [Mr. Young]," and states its "belief" that VAHCC employees discriminated against it and other minority businesses, based on race (African-American).

In order for the Board to review an allegation of bad faith action on the part of a government official, the alleged action must be somehow tied to a provision in, or performance of, a contract. Mr. Jordan's outburst on May 14, 2003, was racially insensitive, unprofessional, and wholly objectionable. We accept for purposes of deciding of this motion that the May 13, 2007, incident occurred as IPS alleges. However, while understandably offensive to Mr. Young, this incident and the appellant's claims that flow from it contain no nexus relative to the administration or performance of the telephone system contract or any other contractual instrument issued to IPS by the VAHCC. A similar nexus is lacking with regard to the appellant's unsupported allegations of bad faith actions on the part of VAHCC employees. Not only has IPS failed to adequately plead any alleged bad faith action on the part of a VAHCC employee, it has also failed to connect such action to its ability to perform a particular contractual instrument issued to it by the VAHCC. Also, the appellant's assertions that further discovery may disclose additional bad faith acts are speculative and unpersuasive. These appeals were docketed over a year ago; the appellant has had sufficient

opportunity to conduct appropriate discovery and find support for its assertions, if any was to be had.³

As the Board has already indicated, some of the bad faith actions alleged by the appellant sound in tort. A tort is defined as “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another.” *Black’s Law Dictionary* 1526 (8th ed. 2004). We recently had occasion to review the applicable jurisdictional prerequisites of federal tort versus federal contract actions in *TAS Group, Inc. v. Department of Justice*, CBCA 52 (July 16, 2007):

Where the “tortious” act is a violation by the Government of its expressed or implied promises under a contract, then an action lies under the statutes waiving sovereign immunity in contract claims disputes (Tucker Act and Contract Disputes Act) rather than those waiving immunity from tort claims (e.g., Federal Tort Claims Act [FTCA]). “Even though . . . a breach of contract action and tort action can co-exist, it is settled that claims essentially based upon an alleged failure to carry out contractual duties are not tort claims which confer jurisdiction under the FTCA.”

. . . .

If the nature of the action is that the defending party breached its expressed or implied contractual obligations, or that it so acted as to come within some clause of the contract entitling the contractor to an equitable adjustment, then the action sounds in contract and may be maintained under the Contract Disputes Act before the Board. Thus, there must be a direct connection between the Government’s contractual obligations and the alleged tortious conduct. “It is not jurisdictionally sufficient if the alleged tortious conduct is

³ Concerning alleged bad faith acts on the part of a government official, we presume that government officials act in good faith in the discharge of their duties. Overcoming that presumption presents IPS with a high hurdle. We recently stated in *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,063, that “a contractor who asserts that a government official was motivated by bad faith in the conduct of his duties bears the burden of proving its assertion by clear and convincing evidence -- ‘evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*.’”

merely ‘related’ in some general sense to the contractual relationship between the parties.”

Slip op. at 3 (citations omitted); *see also H.H.O., Inc. v. United States*, 7 Cl. Ct. 703 (1985); *Writing Co. v. Department of the Treasury*, GSBCA 15634-TD, 02-2 BCA ¶ 32,007; *Thomas D. McCloskey v. General Services Administration*, GSBCA 15901, 02-2 BCA ¶ 32,006; *Asfaltos Panamenos, S.A.*, ASBCA 39425, 91-1 BCA ¶ 23,315 (1990). The Board can retain jurisdiction over a tort only if there is a nexus between the tort and a contractual provision. *Goodfellow Bros., Inc.*, AGBCA 80-189-3, 81-1 BCA ¶ 14,917.

Even assuming *arguendo*, for the purpose of deciding the respondent’s motion, that the Board viewed the appellant’s allegation as true - that Mr. Jordan was in the position to and did adversely impact IPS’ ability to obtain future contracts at the VAHCC - the appellant’s cause of action still lies in tort as opposed to contract. The appellant has wholly failed to articulate how Mr. Jordan’s outburst or the acts of any VAHCC employees breached an express or implied obligation of any contract instrument it had with the VAHCC. Similarly, the appellant’s allegations of conspiracy, sabotage, and attempted financial destruction contain no nexus between the potentially tortious threat made by Mr. Jordan and the VAHCC’s administration of an IPS contract. The Board is not able to “expand” any of the appellant’s claims to make them sound in contract. As the claims giving rise to counts III, IV, V, VII, VIII.A, and VIII.C sound in tort, we lack jurisdiction to consider them as expressed in the appellant’s claim.

Regarding the appellant’s claims asserting violations of civil rights and racial discrimination, this Board does not have jurisdiction to consider those claims. *Bridget Allen*, ASBCA 54696, 05-1 BCA ¶ 32,871; *Charles E. Irons*, ENG BCA 6318, et al., 00-2 BCA ¶ 30,965; *see also Atlanta Appraisal Services, Inc. v. United States*, 54 Fed. Cl. 51, 55 (2002). Jurisdiction to hear claims of discrimination is limited by Title VII of the Civil Rights Act of 1964 and the Age Discrimination Employment Act, both of which grant exclusive jurisdiction over race, sex, and age discrimination claims to the United States District Courts. *See Charles E. Irons*. Concerning general claims of unlawful discrimination, the Board also lacks jurisdiction. *Starghill Alternative Energy Corp.*, ASBCA 49612, et al., 98-1 BCA ¶ 29,708. We are permitted, however, to review such allegations to the extent that they might impinge on the Government’s duty to cooperate with contractors and not impede their performance. The appellant’s burden is to prove specific instances of unlawful discrimination that have a nexus with and adversely impacted its ability to perform under the contract. *See Green Thumb Lawn Maintenance*, ENG BCA 6249, 98-1 BCA ¶ 29,688; *Tarzan Construction, Inc.*, ENG BCA 5552, 91-2 BCA ¶ 23,887. As we made clear *supra*, the appellant has failed to allege in any specific way how Mr. Jordan’s

outburst or any other acts of VAHCC employees adversely impacted its ability to perform at the VAHCC.

The appellant has cited the decision of *Libertatia Associates, Inc. v. United States*, 46 Fed. Cl. 702 (2000), where the Court of Federal Claims found that government officials administering the contract acted in bad faith, resulting in an improper termination for default. The instant appeals are distinguishable from *Libertatia* for a number of reasons. *Libertatia* involved a termination for default. The court found that the contracting officer's representative (COR) in *Libertatia* had repeatedly demonstrated personal animosity toward the contractor, exhibited an intent to ruin the plaintiff, obtained financial benefit for himself during the contract, and been overzealous in his inspections, causing delays and extra expense for the contractor. *Id.* at 705. These factors, the court concluded, constituted "significant evidence that the government acted in bad faith in its administration and termination of the contract." *Id.* at 707. The court in *Libertatia* also faulted the contracting officer, who it concluded had also made unprofessional comments about the contractor's officers, saying that the contracting officer was "at the very least, on notice of the COR's bad faith toward plaintiff" and "did nothing to remove the COR's influence over the administration of the contract." *Id.* at 711.

Although Mr. Jordan's outburst was surely offensive and unprofessional, we do not see the facts presented here to be at all similar to those in *Libertatia*. The complaint contains no well-pled allegations that IPS was at risk of default or incurred additional costs to perform due to "bad faith acts" by a VAHCC employee. Further, IPS has provided no information on how it believes the May 14, 2004, outburst was somehow tied to or led to an adverse contractual action or resulted in harm to IPS during the performance of the contract. The documents reveal that the VAHCC continued to contract with IPS for more than three years after the incident occurred. IPS has provided no evidence that the contract was maladministered or breached as a result of Mr. Jordan's comment, or for that matter, that some other improper administrative action was taken by Mr. Jordan or other VA contracting officials. Without a nexus between alleged bad faith actions and a contract provision or performance, the Board is without jurisdiction to consider these claims.

To recover for bad faith action by government officials under a contract - including for tortious or discriminatory conduct - a contractor must provide a direct connection between the alleged bad faith action and an express or implied contractual obligation or contract term. If a bad faith, tortious, or discriminatory action on the part of a government official is merely "related" in some general sense to a "contractual relationship" between the parties, as opposed to a "particular contract," we lack the jurisdiction to review those bad faith acts. It is not jurisdictionally sufficient for a government official to have simply "acted in bad faith." In these appeals, the Board lacks jurisdiction to review any and all alleged bad

faith actions, including those sounding in tort and discrimination, because the appellant has failed to provide such a nexus. To the extent appellant seeks remedies provided by statutes and regulations other than the CDA and its implementing regulations, the appellant must initiate separate proceedings in the appropriate courts or tribunals. See *Dan Parish v. General Services Administration*, GSBICA 16025, 03-1 BCA ¶ 32,211.

In addition to its assertions of bad faith, tort, and racial discrimination, the appellant charges that the VAHCC has made poor telecommunications systems procurement decisions. The Board does not have jurisdiction to review an agency's determination of its needs or method of fulfilling those needs. *Reginald H. Martin & Associates*, IBCA 3967-98, 99-2 BCA ¶ 30,417. IPS' remedy for dissatisfaction with how the VAHCC procures its future needs is through the bid protest arena. The CDA limits our jurisdiction to contracts between the Government and a contractor. 41 U.S.C. § 602 (2000). We do not have jurisdiction over bid protests because bid protests, by definition, involve disputes between the Government and disappointed bidders. *Thomas Creek Lumber & Log Co.*, IBCA 3917, et al., 05-2 BCA ¶ 32,976; *Coyne Textile Services*, AGBICA 97-104-1, 97-1 BCA ¶ 28,626 (1996); see also *Charles Hartlerode*, ASBCA 52634, 02-1 BCA ¶ 31,716 (2001); 4 CFR pt. 21 (2007). Also, we note that in its brief the respondent proffers that an "appropriate personnel action was taken" against Mr. Jordan. The propriety of personnel actions taken against government employees is beyond the Board's jurisdiction. *Four-Phase Systems, Inc.*, ASBCA 26794, et al., 86-2 BCA ¶ 18,924.

By our decision here, the respondent's remaining motions and the appellant's motion are rendered moot.

Decision

The respondent's motion to dismiss for lack of jurisdiction is hereby GRANTED, and the appeals of *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, 33, 365, 366, and 367, are **DISMISSED FOR LACK OF JURISDICTION**.

PATRICIA J. SHERIDAN
BOARD JUDGE

We concur:

ANTHONY S. BORWICK
Board Judge

EILEEN P. FENNESSY
Board Judge

CBCA 12, 33, 365, 366, 367

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